UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE RIVERA, Petitioner,	89 Crim. 346 (LAP)
-against-	94 Civ. 951 (LAP)
UNITED STATES OF AMERICA, Respondent.	MEMORANDUM AND ORDER

LORETTA A. PRESKA, Chief United States District Judge:

On November 16, 1990, George Rivera ("Petitioner") was convicted of (1) conspiring to distribute and to possess with intent to distribute in excess of one kilogram of heroin in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 and (2) attempted income tax evasion for the calendar year 1988 in violation of 26 U.S.C. § 7201. See United States v. Rivera, 971 F.2d 876, 880-82 (2d Cir. 1992). Petitioner was sentenced to life imprisonment on April 24, 1991, and the Court of Appeals affirmed the conviction and sentence. See generally id.

On January 25, 1994, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255; the petition challenged, inter alia, the manner in which the jury was selected at his criminal trial. [See Dkt. No. 1 in 94 Civ. 951.] On November 20, 1996, Judge Kram denied the petition on the grounds that Petitioner's claims were procedurally barred

and lacked merit. [See Dkt. No. 3 in 94 Civ. 951.] The Court of Appeals affirmed Judge Kram's decision. Rivera v. United States ("Rivera II"), 159 F.3d 1348 (2d Cir. 1998) (summary order). On October 21, 2008, Petitioner, proceeding pro se, filed the instant application to reopen these proceedings [Dkt. No. 808 in 89 Crim. 346].

Petitioner brings this motion under Federal Rules of Civil Procedure 60(b)(3) and 60(d).[1] Rule 60(b)(3) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Challenges under Rule 60(b)(3) must be made within one year after the entry of the judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c)(1). Here, the district court denied Petitioner's previous petition for a writ of habeas corpus on November 20, 1996. Petitioner did not file the instant motion until October 21, 2008, nearly twelve years

[1] In his reply brief, Petitioner asserts that he is also entitled to relief pursuant to Federal Rule of Civil Procedure 60(b)(4). The Court need not consider this argument because it was raised for the first time in Petitioner's reply brief. See Thomas v. Roach, 165 F.3d 137, 145-46 (2d Cir. 1999). Even so, the Court would reject such a claim because Petitioner presents no evidence that the judgment was void and instead attempts to raise another impermissible direct attack on his criminal conviction.

later. Thus, to the extent that Petitioner's motion is asserted under Rule 60(b)(3), it is untimely.

Rule 60(d) grants courts the power to "entertain an independent action to relieve a party from a judgment" or "set aside a judgment for fraud on the court." If, however, a movant could have pursued a timely Rule 60(b)(3) motion but inexcusably failed to do so, the movant is precluded from relying on Rule 60(d) to bring his claims outside of Rule 60(b)(3)'s one-year statute of limitations period. See In re Lawrence, 293 F.3d 615, 622 n.5 (2d Cir. 2002); Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 662 (2d Cir. 1997). Here, Petitioner could have pursued his present claims under Rule 60(b)(3) and has provided no justification for the nearly twelve-year delay in doing so. Therefore, the Court rejects Petitioner's attempt to circumvent Rule 60(b)(3)'s one-year limitations period.

Untimeliness aside, none of Petitioner's claims address the integrity of the proceedings in which his petition was denied. Instead, Petitioner's present motion (1) seeks to relitigate issues already properly disposed of during prior habeas proceedings and (2) raises a new claim directly attacking

his underlying criminal conviction.[2] These arguments are not the proper subject of either a Rule 60(b)(3) or Rule 60(d) motion. See Marmolejas v. United States, No. 05 Civ. 10693, 2010 WL 3452386, at *4 (S.D.N.Y. Sept. 2, 2010) ("Rule 60 may not be used to challenge a movant's underlying conviction or sentence after that movant's habeas petition attacking the same conviction or sentence on the same basis has been denied." (internal quotation marks omitted)); Meteor Ag v. Fed. Express Corp., No. 08 Civ. 3773, 2009 WL 3853802, at *3 (S.D.N.Y. Nov. 18, 2009) ("New arguments may not be . . . made in a motion for relief under Rule 60(b)." (citing Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1986))); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2868 (2d ed. 2010) ("[An independent action] is not a remedy for inadvertence or oversight by the losing party in the original action, nor will it lie on behalf of a party who was himself at fault." (citations omitted)).

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[2] Petitioner's claims include: "(1) the government perpetrating a fraud upon the Court which precluded a merits determination on Petitioner's contentions; (2) the Court not making a merits determination on Petitioner's Fed. R. Crim. P. 43(a) claim in light of ineffective assistance of appellate counsel[;] and (3) the Court erroneously denying Petitioner an evidentiary hearing." (Pet'r's Mem. Supp. Mot. at 1 [Dkt. No. 808 in 89 Crim. 346].)

First, with respect to Petitioner's claim that "the government perpetrat[ed] a fraud upon the Court which precluded a merits determination on Petitioner's contentions," Petitioner previously raised this precise argument on appeal of the dismissal of his habeas petition. (See Reply Br. Appellant George Rivera at 5, Rivera v. United States, No. 97-2112 (2d Cir. Feb. 1998).) The Court of Appeals found that this argument was without merit, see Rivera II, 1998 WL 513948, at *1,[3] and this Court will not revisit it.

Second, with respect to Petitioner's claim based upon "the Court not making a merits determination on Petitioner's Fed. R. Crim. P. 43(a) claim in light of ineffective assistance of appellate counsel," Petitioner never before raised an ineffective assistance of appellate counsel claim as to his substantive appeal. Petitioner did not assert such a claim in his habeas petition nor did he raise the issue on appeal of the dismissal of said petition. Thus, Petitioner is precluded from raising this new direct attack on his underlying conviction for the first time here. See Meteor Ag, 2009 WL 3853802, at *3.

[3] Although the Court of Appeals did not explicitly address Petitioner's "fraud" argument in its summary order rejecting Petitioner's appeal, this is not a basis to assert that the arguments were not disposed of in the prior proceedings. See United States v. Jones, 918 F.2d 9, 10-11 (2d Cir. 1990).

Finally, Petitioner's allegation that "the Court erroneously den[ied] Petitioner an evidentiary hearing" fails because petitions for a writ of habeas corpus are often denied without the need for an evidentiary hearing. See United States v. Espinal, No. 91 Crim. 310, 2010 WL 23168, at *1 n.2 (S.D.N.Y. Jan. 5, 2010) (citing Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts). Petitioner's claim also fails because it is not an attack on the integrity of the prior habeas proceeding. Instead, Petitioner merely attempts to tie this claim to his procedurally improper attack on the merits of his underlying criminal conviction. See id.; see also In re Lindsey, 582 F.3d 1173, 1175 (10th Cir. 2009).

For the foregoing reasons, Petitioner's "Independent Action in Equity" pursuant to Rule 60(b)(3) or in the alternative pursuant to Rule 60(d) [Dkt. No. 808 in 89 Crim. 346] is DENIED in its entirety. All outstanding motions are denied as moot.[4] As Petitioner has not made a substantial

[4] Subsequent to the instant motion, Petitioner filed two motions to cure a deficiency in the court's docket [Dkt. Nos. 838 and 839 in 89 Crim. 346; Dkt. Nos. 18 and 19 in 94 Civ. 951]. The purpose of these motions was to ensure that Petitioner's reply to the instant motion, the Government's response thereto, and Petitioner's sur-reply are all reflected on the docket for purposes of preserving the record. Petitioner's reply has already been filed on the habeas docket [Dkt. No. 15 in 94 Civ.
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showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253(c)(2); United States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 444 (1962).

SO ORDERED.

DATED: New York, New York
May 21, 2012

UNITED STATES DISTRICT JUDGE

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951] and is being docketed in the underlying criminal case simultaneously with the filing of this order. The other two documents were appended to Petitioner's second motion to cure a deficiency in the record, which was filed in each case [Dkt. No. 839 in 89 Crim. 346; Dkt. No. 19 in 94 Civ. 951]. As such, the record in each docket now accurately reflects the full briefing on the instant motion.